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Supreme Court, U.S.
FILED
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No. 01-1066

In the Supreme Court of the United States

BAILLON COMPANY,

Petitioner,

v.

PORT AUTHORITY OF THE CITY OF SAINT PAUL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a Minnesota government entity acquiring title to property in its own name, with its own money and under condemnation procedures set forth in the state statute creating the entity, should instead be required to use the condemnation procedures of another Minnesota government entity that cooperated in the public project to be built on the condemned property?

CORPORATE DISCLOSURE STATEMENT

Port Authority of the City of Saint Paul is a body politic and corporate organized and existing pursuant to Minn. Stat. § 469.049.

Baillon Company is a privately held Minnesota corporation.

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CONSTITUTIONAL PROVISIONS INVOLVED

Section 7 of Article I to the Minnesota Constitution provides in relevant part:

> No person shall be . . . deprived of . . . property without due process of law.

MINN. CONST. ART I, § 7.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1257(a) provides in relevant part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . any title, right, privilege, or immunity is specifically set up or claimed under the Constitution or the treaties or statutes of . . ., the United States.

28 U.S.C. § 1257(a) (2000).

Minn. Stat. § 117.042 provides in relevant part:

> Whenever the petitioner shall require title and possession of all or part of the owner's property prior to the filing of an award by the court appointed commissioners, the petitioner shall, at least 90 days prior to the date on which possession is to be taken, notify the owner of the intent to possess by notice served by certified mail and before taking title and possession shall pay to the owner or deposit with the

court an amount equal to petitioner's approved appraisal of value.

Minn. Stat. § 117.042 (2000).

Minn. Stat. § 117.055 provides in relevant part:

In all cases a petition, describing the desired land, stating by whom and for what purposes it is proposed to be taken, and giving the names of all persons appearing of record or known to the petitioner to be the owners thereof shall be presented to the district court. . . . Notice of the objects of the petition and of the time and place of presenting the same shall be served at least 20 days before such time of presentation upon all persons named in the petition as owners . . . .

Minn. Stat. § 117.055 (2000).

Minn. Stat. § 117.075 provides in relevant part:

Upon proof being filed of the service of such notice, the court, at the time and place therein fixed or to which the hearing may be adjourned, shall hear all competent evidence offered for or against the granting of the petition, regulating the order of proof as it may deem best. If the proposed taking shall appear to be necessary and such as is authorized by law, the court by an order shall appoint three disinterested commissioners, and at least two alternates, residents of the county, to ascertain and report the amount of damages that will be sustained by the several owners on account of such taking.

Minn. Stat. § 117.075 (2001).

Minn. Stat § 469.049 provides in relevant part:

> A port authority is a body politic and corporate with the right to sue and be sued in its own name.
>
> A port authority carries out an essential governmental function of the state when it exercises its power . . . .

Minn. Stat. § 469.049, subd. 2 (2000).

Minn. Stat. § 469.055 provides in relevant part:

> A port authority may acquire under eminent domain property of any kind within the port district needed by it for public use . . . .

Minn. Stat. § 469.055, subd. 8 (2000).

RESPONDENT'S STATEMENT OF THE CASE

This case involves the acquisition for public use of a twelve-stall surface parking lot in downtown Saint Paul, Minnesota (the "Property"). The Property is to be used for the construction of a stair tower, elevator, and the beginning of a tunnel which will continue to and connect the existing downtown Saint Paul skyway system with the RiverCentre Complex.[1] (Petitioner's Appendix "PA" 14-15, 25). For several years, the Port Authority of the City of Saint Paul (the "Port Authority"), the City of Saint Paul (the "City"), Ramsey County (the "County"), the Saint Paul Convention and

[1] The RiverCentre Complex is a publicly-owned facility located on the southwest edge of the Saint Paul downtown which now includes the Xcel Arena (home of the Minnesota Wild NHL franchise), Touchstone Energy Place (a convention center), and the Roy Wilkins Auditorium.

Visitors Bureau Foundation (the "CVB Foundation"), Capital City Properties, and others conducted several studies and considered many alternatives. (PA 14). These studies and considerations culminated in the decision by the Port Authority to acquire the Property under its powers of eminent domain pursuant to state statute. (PA 41-42; *see* Minn. Stat. § 469.055, subd. 8 (2001)).

A. Factual Background

In September 1996, the Saint Paul City Council (the "City Council") adopted a resolution supporting an enclosed, climate-controlled, continuous walkway to link the major downtown hotels and the Saint Paul Civic Center, now known as the RiverCentre. (PA 3). The details on how to accomplish the connection remained to be determined.

On December 22, 1997, the Saint Paul City Council adopted Resolution No. 97-1551, in which it determined that "the creation of a continuous climate-controlled connection to the downtown skyway system would substantially increase the attractiveness of the RiverCentre as a potential convention location, thereby increasing convention business and enhancing the economic vitality of the downtown business district." (Resolution No. 97-1551, Ct. App. Appendix at 285). The City Council further noted how in 1996, Ramsey County government officials expressed an interest in having such a pedestrian connection and that "the Saint Paul Port Authority has expressed interest in funding the skyway link through the Landmark Tower block and across Fourth Street to the edge of the US West property." (*Id.*).

The City Council considered the results of a 1997 study that analyzed the Fourth Street and Kellogg Boulevard alternatives and the alternative designs from a design charrette. (PA 9). The Council noted: "as a result of the design charrette, a modification to the 'Fourth Street' alternative has been suggested that extends the tunnel

eastward from Fourth and Market Streets to the middle of the block of Fourth Street between Saint Peter and Market Streets, and connected directly to the proposed Fourth Street skyway." (Ct. App. Appendix at at 285). The City Council then approved "the 'Fourth Street' alternative with the tunnel extension to mid-block along Fourth Street between Saint Peter and Market Streets" and resolved "that the Office of Financial Services, the Department of Planning and Economic Development, the Port Authority, the Civic Center Authority, the Visitors and Convention Bureau and the Capital City Partnership collaborate with other public and private beneficiaries for commitments of approximately $10,000,000 for the modified 'Fourth Street' alternative." (Ct. App. Appendix at 286).

On September 1, 1999, the Saint Paul City Council adopted Preliminary Order No. 99-843, scheduling a public hearing for 5:30 p.m. on October 6, 1999, to consider "the matter of constructing the RiverCentre Connection between RiverCentre and the existing skyway system at Landmark Tower, which includes a new skyway across 4th Street and tunnel along the south side of 4th St. from mid-block between St. Peter and Market Streets to the Rice Park entrance of RiverCentre." (Preliminary Order No 99-843, Ct. App. Appendix at 289-90). The public hearing was held on October 6, 1999, due notice having been given as prescribed by the City Charter. (Final Order No 99-970, Ct. App. Appendix at 287-88). At the public hearing, the Council "heard all persons, objections and recommendations pertaining to said proposed improvement and has fully considered the same." (*Id.* at 288). Thereafter, the City Council adopted Final Order 99-970, resolving that the improvement be made for "constructing the RiverCentre Connection between RiverCentre and the existing skyway system at Landmark Tower." (*Id.*)

On January 25, 2000, the Board of Commissioners of the Port Authority adopted Resolution No. 3818, a certified copy

of which was attached to the Port Authority's Petition in Condemnation and Motion for Transfer of Title and Possession Under Minn. Stat. § 117.042 as Exhibit "A" (the "Resolution"). (PA 41-42). In the Resolution, the Port Authority noted its previous commitment to contribute monies for the connection of the RiverCentre with the downtown skyway system and how "the City of Saint Paul has suggested that the Port Authority in lieu of its cash contribution undertake the acquisition of a small unimproved surface parking lot adjacent to the US West building on Fourth Street." (PA 41). The Commissioners also noted how the Property was located within the Port Authority's downtown economic development district and its "staff has recommended that the Port Authority undertake the acquisition of this underutilized property for the betterment of the downtown economic development district and to facilitate the skyway connection of numerous buildings owned and/or financed by the Port Authority in the downtown economic development district." (PA 21, 41).

Port Authority Resolution No. 3818 concludes as follows:

> NOW THEREFORE, BE IT RESOLVED BY THE BOARD OF COMMISSIONERS OF THE PORT AUTHORITY OF THE CITY OF SAINT PAUL: That the acquisition of the surface parking lot located on Fourth Street directly across from the Landmark Towers as legally described in Exhibit A attached hereto [the "Property"] is necessary and is in the best interest of the port district and the taxpayers thereof.
>
> AND BE IT FURTHER RESOLVED that staff and legal counsel is hereby authorized and directed by the Board of Commissioners of the Port Authority

of the City of Saint Paul to enter into negotiations with the owner of said property for its acquisition.

AND BE IT FINALLY RESOLVED that in the event negotiations for the acquisition of said property are not fruitful, legal counsel is hereby authorized and directed to acquire said property in the name of the Port Authority pursuant to the Port Authority's powers of eminent domain.

(PA 41-42).

The following week, the City of Saint Paul's Department of Technology and Management Services sent Baillon a notice that the City had proposed improvements in the downtown area and that acquisition of Baillon's property may be necessary to complete this task. (PA 45-47). The notice advised Baillon that a public hearing was being scheduled before the Saint Paul City Council for February 23, 2000, and provided the names of contact persons if Baillon had any questions. (PA 45-47).

A week later, on February 16, 2000, the same city department sent a second notice to Baillon. (PA 48). The subject of this notice was "Acquisition of Property Rights for Pedestrian Walkway Tunnel." (*Id.*). The notice stated:

It has been brought to our attention that the Saint Paul Port Authority intends to proceed with the acquisition of property rights necessary to construct the above mentioned pedestrian tunnel, for that reason the Public Hearing for the City of Saint Paul to proceed with acquisition of 60 Fourth Street West **will not** take place on Wednesday, February 23, 2000.

> If you have any questions concerning the property rights being acquired, please contact Bill Morin of the Saint Paul Port Authority at (651) 224-5686.

(PA 48) (emphasis in original). Baillon never raised an issue regarding the cancellation of the proposed February 23, 2000 public hearing until the district court hearing on January 25, 2001, more than eleven months after the fact. (PA 20).

In May 2000, the Port Authority, the City, the County, Capital City Properties, and the CVB Foundation entered into the RiverCentre Pedestrian Link Cooperative Agreement (the "Agreement"). (PA 15, 25, 58-62). The Agreement provides for specific responsibilities and obligations upon each of the parties in order to acquire property for, design, and construct the proposed pedestrian connection between the RiverCentre Complex and the existing skyway system in Landmark Towers. (PA 58-62).

The specific duties of the Port Authority, the City, and the County were detailed in the Agreement. (PA 58-62). Among the Port Authority's duties were to acquire all permanent and temporary real property and easement rights necessary for construction and operation of the project; to select a design consultant/architect and enter into a contract with such consultant/architect for design, engineering and preparation of construction plans, specifications, and public bidding documents; to conduct all tests required to proceed with the project; and to obtain in its name all required local permits and approvals. (PA 60-61) The Agreement specifically provides that "[n]o partnership, joint venture, or principal agent is established among the parties under this Agreement." (PA 62) (emphasis added).

The Port Authority subsequently had the Baillon property appraised. (PA 4). The Port Authority made an offer to Baillon to acquire the Property for a sum in excess of the amount of its approved appraisal of value, which figure was

$360,000. (PA 4, 16, 26). The Port Authority's offer was rejected.[2] (*Id.*).

B. Proceedings Before The Ramsey County District Court

On November 22, 2000, the Port Authority filed with the Ramsey County District Court its Petition in Condemnation and Motion for Transfer of Title and Possession under Minn. Stat § 117.042 (the "Petition"). (PA 6, 33-42). The Petition, Notice of Hearing on Petition in Condemnation and Motion for Transfer of Title and Possession Under Minn. Stat. § 117.042, Notice of Intent to Take Possession Under Minn. Stat. § 117.042, proposed Order Granting Petition and Appointing Commissioners, and proposed Order Authorizing Payment or Deposit and Transferring Title were served on all respondents on November 29, 2000. (PA 27) A hearing was scheduled before the district court for January 26, 2001. (PA 14, 24).

In late December 2000, Baillon's attorneys served a Data Practices Act request pursuant to Minn. Stat. §13.01 *et seq.*, upon the Port Authority. Baillon sought all documents relating to the RiverCentre Connection project. (Baillon's Brief to Minnesota Court of Appeals at 19). In response to Baillon's Data Practices Act request, the Port Authority produced all documents in its possession regarding the acquisition of the Baillon property. (*Id.*).

Having been advised that Baillon may be challenging the Port Authority's proposed acquisition, on January 24, 2001, the Port Authority filed and served its Memorandum of Law in Support of Its Petition in Condemnation and Motion for Transfer of Title and Possession Under Minn. Stat. § 117.042.

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[2] Despite Baillon's representation to the Court, Baillon **never** raised the issue of a public hearing during negotiations. It was, and continues to be, a monetary issue.

On the afternoon before the scheduled hearing, Baillon submitted a nine-page, single-spaced letter brief in opposition to the taking and use of the quick take procedure by the Port Authority. (Ct. App. Appendix at 31-38). The brief was accompanied by the Affidavit of James L. Forman, to which were attached eleven exhibits, comprising approximately one inch of paper. (Ct. App. Appendix at 40-240). A hearing lasting over an hour was held on January 26, 2001, before the Honorable John S. Connolly, Judge of District Court. (Baillon's Informal Brief to Minnesota Court of Appeals at 5). Additional exhibits were introduced during the hearing. (PA 4).

At the hearing, Baillon, who was represented by counsel, argued the same three points that it had briefed. First, that the Port Authority should have followed the City Charter and held a public hearing before condemning the Property. Second, that the Port Authority's Resolution was unnecessary, arbitrary and capricious. Finally, that the taking of the Property was premature. (PA 19, 29). The district court ultimately issued Orders granting the Petition, and authorizing payment or deposit and transferring of title. (PA 13-22, 23-32). The Orders were accompanied by memoranda addressing, and rejecting, all of Baillon's arguments. (PA 19-22, 29-32).

C. The Decision Of The Minnesota Court of Appeals

Baillon filed its notice of appeal with the Minnesota Court of Appeals on February 28, 2001. Baillon simultaneously moved the Minnesota Court of Appeals for expedited consideration. The motion was denied by Order dated March 13, 2001.

Baillon submitted a twenty-five page informal letter brief to the Minnesota Court of Appeals on March 14, 2002. In its informal brief, Baillon again argued that the Port Authority was the agent of the City and therefore should have been

required to follow the condemnation procedures in the City Charter. (Baillon's Informal Letter Brief to Minnesota Court of Appeals at 9-15). Baillon also argued that the district court erred in not denying the Port Authority's Petition in Condemnation on grounds of the taking being premature and unnecessary. (*Id.* at 15-23). The Port Authority submitted its brief in opposition on April 13, 2001. (Port Authority's Brief on the Merits). Oral argument was heard on May 17, 2001. The Minnesota Court of Appeals squarely addressed all of the issues raised by Baillon before affirming the district court's Orders in an unpublished decision. (PA 2-12).

D. Decision Of The Minnesota Supreme Court

Baillon petitioned the Minnesota Supreme Court for discretionary review of the court of appeals' decision. The basis for the appeal was that the court of appeals' decision denied Baillon's due process rights, by not affording Baillon with a public hearing before the City Council, and not allowing a further evidentiary hearing at the district court. (Baillon Petition for Review at 1-5). The Minnesota Supreme Court declined to review the same issues Baillon now raises before this Court. (PA 1).

REASONS FOR DENYING THE PETITION

This Court does not have jurisdiction over this matter. Baillon's assertion of jurisdiction under 28 U.S.C. 1257(a) is misguided because this is the first and only time during these proceedings that Baillon has raised a due process claim under the United States Constitution. Due process under the United States Constitution was never considered by the district court or the Minnesota Court of Appeals. Jurisdiction in this Court is therefore lacking.

Should the Court determine it does have jurisdiction over this matter, it should deny Baillon's petition as a matter of

discretion. Baillon does not provide this Court with "compelling reasons" to decide an "important question of federal law." Sup. Ct. R. 10. Baillon is asking this Court to review the Minnesota Court of Appeals' interpretation of the Minnesota constitution, Minnesota statutes, and a question of fact under state law. The Minnesota Court of Appeals found that Baillon's due process rights were not violated in any way, because Baillon received all of the process due under the Minnesota constitution and the Minnesota statutes. The court of appeals did not address a federal due process question because Baillon never raised one. The Minnesota Court of Appeals also fully considered the issue of whether the Port Authority was acting as the City's agent, and found that as a matter of state law, the Port Authority was not acting as an agent for the City when the Port Authority acquired the Property. In so holding, the Minnesota Court of Appeals did not decide an "important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). An agency relationship is a question of fact under Minnesota law. *White v. Boucher*, 322 N.W.2d 560, 566 (Minn. 1982).

I. THIS COURT DOES NOT HAVE JURISDICTION TO HEAR PETITIONER'S CLAIM UNDER 28 U.S.C. § 1257

This Court's certiorari jurisdiction over decisions from state courts derives from 28 U.S.C. § 1257, which provides that "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . any title, right, privilege, or immunity is specifically set up or claimed under the Constitution or the treaties or statutes of...the United States." 28 U.S.C. § 1257(a) (emphasis added). To the extent Baillon had a claim that it was denied its right to due process of law under the United States Constitution, such claim was waived by failing to raise it below. At no stage in

the proceedings has Baillon ever framed the due process issue as a federal question under the due process clause of the Fourteenth Amendment to the United States Constitution.

Baillon has generically referred to its "due process rights" at the state district court, the Minnesota Court of Appeals and the Minnesota Supreme Court. As does the United States Constitution, the Minnesota constitution states that "No person shall be . . . deprived of . . . property without due process of law." Minn. Const. Art. I, § 7. "[I]t is settled that such an averment [to due process of law], making no reference to the Constitution of the United States, and asserting no express rights thereunder, is solely referable to the state Constitution, which, in this instance, has a due process clause, and affords no basis whatever for invoking the jurisdiction of this court." *Bowe v. Scott*, 233 U.S. 658, 664-65 (1914). Baillon has thus waived the federal question it now asserts because this is the first time it has raised a claim of due process specifically under the United States Constitution.

Where a petitioner has not raised a federal question in the state courts, the Supreme Court may exercise jurisdiction under 28 U.S.C. § 1257 if the federal issue was resolved by the state court, despite not being specifically raised by the appellant. *See Illinois v. Gates*, 462 U.S. 213, 218 n.1 (1983). Baillon's argument in the instant case, however, was based in its entirety upon the due process clause of the Minnesota constitution. The Minnesota Court of Appeals never referenced the United States Constitution when addressing Baillon's due process claim. The Minnesota Court of Appeals referred only to the Minnesota constitution when deciding that Baillon had not been denied due process of law. (PA 6). The Minnesota Supreme Court also did not address the issue when declining review. Quite simply, this Court does not have jurisdiction over a matter never framed as a federal question nor considered by the state court.

II. PETITIONER HAS PRESENTED NO COMPELLING REASON FOR GRANTING PLENARY REVIEW AS THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW AT ISSUE

Even if the Court determines it has jurisdiction over Baillon's claim under 28 U.S.C. § 1257(a), it should exercise its discretion and deny the petition. A petition for writ of certiorari is only granted for compelling reasons. Sup. Ct. R. 10. Although Baillon never refers to Supreme Court Rule 10(c), it apparently relies on that rule as a reason for the Court to grant its petition. Rule 10(c) states that the Court will consider granting a petition for writ of certiorari where "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). Baillon has not presented this Court with an "important question of federal law," and certainly not a question that should be "settled by this Court."

Baillon states it has presented "an important question" that needs to be resolved by this Court. (Petition at 13). While the "import" of the question is debatable, not even Baillon argues that the question is "federal" is nature. Baillon, for the first time now asserts that they were denied due process under the United States Constitution. Disregarding the untimely nature of Baillon's assertion, Baillon was not denied due process under the United States Constitution because it received the process it was due under the United States Constitution.

Due process under the United States Constitution is satisfied by notice and an opportunity to be heard. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). The same is required under the Minnesota Constitution's due process clause. *See Alton v. Wabedo Township*, 524 N.W.2d 278, 281 (Minn. Ct. App. 1994). Notice and an opportunity to be heard were precisely what

Baillon received. To the extent Baillon argues it was entitled to more process (through a public hearing before the City Council) it is relying upon the Minnesota Constitution, Minnesota statutes and the Saint Paul City Charter, all of which are interpreted by the courts of Minnesota. The district court and the Minnesota Court of Appeals interpreted these very documents in determining that Baillon was not denied its due process rights. The Minnesota Supreme Court did not deem the lower court's decision worthy of further review.

Despite Baillon's statement to the contrary, (Petition at 11), this is a case where a government authority has followed its condemnation procedures and those procedures have been found constitutional. The district court found that "[t]he procedures used by the Port Authority are in accord with the statutes governing the acquisition of real property through condemnation." (PA 17). These "procedures" have been found constitutional by the Minnesota Supreme Court. *See Port Auth. of Saint Paul v. Fisher*, 269 Minn. 276, 132 N.W.2d 183 (1964).

Baillon's due process argument is really nothing more than a quarrel with the Minnesota Court of Appeals' factual finding that there was no agency relationship. Baillon's entire argument in its petition is predicated upon its desire that this Court reverse the lower courts and hold, as a matter of fact under Minnesota law, that the Port Authority was an agent of the City. The Court should decline Baillon's invitation to grant review based upon an alleged erroneous factual finding under state law.

III. THE MINNESOTA COURT OF APPEALS FOUND THAT BAILLON RECEIVED ALL THE PROCESS TO WHICH IT WAS DUE

Under Minnesota law, to acquire title to the Property by eminent domain, the Port Authority had to establish that it

had the power of eminent domain, the proposed taking was for a valid public use or public purpose, the Property was necessary to further a public use or public purpose, and, since it was seeking to take the Property pursuant to Minn. Stat. § 117.042, the use of the quick take procedure was reasonable. *See City of Duluth v. State*, 390 N.W.2d 757 (Minn. 1986). In *City of Duluth*, the court held that "[c]ondemnation is clearly a deprivation of property requiring pre-deprivation notice and opportunity to be heard. This requirement is satisfied by the petition to condemn." 390 N.W.2d at 771. In this case, Baillon received almost two months prior notice of the hearing; Baillon was allowed to review all of the Port Authority's documents regarding the project; Baillon submitted documents by affidavit and argued that a public hearing was required, and that the taking was both unnecessary and premature. Baillon presented oral argument on all of these issues before the district court. Plainly, Baillon had all the notice and opportunity to be heard required by either the Minnesota or United States Constitution.

The Port Authority has the legal right to "acquire under eminent domain property of any kind within the port district needed by it for public use...." *See* Minn. Stat. § 469.055, subd. 8 (2000). "The port authority shall adopt a resolution describing the property and stating its intended use and the necessity of the taking." *Id.* The Port Authority may also exercise the right of eminent domain to acquire property which is necessary for carrying out an economic development project. *See* Minn. Stat. § 469.058, subd. 4 (2000). Further, the Minnesota Legislature has specifically vested condemning authorities with the ability to acquire real property on an expedited basis.[3]

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[3] "Whenever the petitioner shall require title and possession of all or part of the owner's property prior to the filing of an award by the court appointed commissioners, the petitioner shall, at least 90 days prior to the date on which possession is to be taken, notify the owner of the intent to possess . . . ." Minn. Stat. § 117.042 (2000) (the "quick take" statute).

A. Petitioner Received Notice of the Port Authority's Intent to Acquire the Property Through Use of its Eminent Domain Powers

Baillon received the notice to which it was entitled under due process of law. Minn. Stat. § 117.055, which sets forth the petition and notice procedures, states:

> In all cases a petition, describing the desired land, stating by whom and for what purposes it is proposed to be taken, and giving the names of all persons appearing of record or known to the petitioner to be the owners thereof shall be presented to the district court. . . . Notice of the objects of the petition and of the time and place of presenting the same shall be served at least 20 days before such time of presentation upon all persons named in the petition as owners . . . .

Minn. Stat. § 117.055 (2000).

On November 22, 2000, the Port Authority filed with the Ramsey County District Court its Petition in Condemnation and Motion for Transfer of Title and Possession under Minn. Stat § 117.042 (the "Petition"). (PA 6). The Petition, Notice of Hearing on Petition in Condemnation and Motion for Transfer of Title and Possession Under Minn. Stat. § 117.042, Notice of Intent to Take Possession Under Minn. Stat. § 117.042, proposed Order Granting Petition and Appointing Commissioners, and proposed Order Authorizing Payment or Deposit and Transferring Title were served on all Baillon on November 29, 2000. (*Id.*).

Notice of the hearing was served on November 29, 2000, well in advance of the twenty-day minimum required by Minn. Stat § 117.055. The notice of the hearing advised Baillon of the date and time of the hearing, the place,

including room number, the name of the judge to hear the proceeding, the purpose of the proceeding and a legal description of the subject property. (Notice of Hearing on Petition in Condemnation dated November 29, 2000).[4]

B. Petitioner Received An Opportunity to be Heard

Baillon also received its due process right of an opportunity to be heard. Minnesota Statutes § 117.075 provides in relevant part:

> Upon proof being filed of the service of such notice, the court, at the time and place therein fixed or to which the hearing may be adjourned, shall hear all competent evidence offered for or against the granting of the petition, regulating the order of proof as it may deem best. If the proposed taking shall appear to be necessary and such as is authorized by law, the court by an order shall appoint three disinterested commissioners, and at least two alternates, residents of the county, to ascertain and report the amount of damages that will be sustained by the several owners on account of such taking.

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[4] Baillon knew in February 2000 that the Port Authority was likely to be acquiring its property. (*See* letter dated February 16, 2000) (Pet. App. A-48). This letter, authored by the City's Department of Technology and Management Services, states that the "Port Authority intends to proceed with the acquisition of property rights" and provides the name [Bill Morin] and phone number of the person to contact at the Port Authority if Baillon had any questions. (*Id.*) Moreover, Baillon is not an unsophisticated property owner, having been involved in previous eminent domain cases. *See State by Humphrey v. Baillon Co.*, 503 N.W.2d 799 (Minn. Ct. App. 1993); *State by Humphrey v. Baillon Co.*, 480 N.W.2d 673 (Minn. Ct. App. 1992). Prior to even serving the Petition in Condemnation, the Port Authority had negotiations with Baillon and made an offer to buy the Property, which Baillon rejected. (Pet. App. A-4).

Minn. Stat. § 117.075 (2000).[5]

In preparation for the hearing, Baillon's attorneys served a Data Practices Act request upon the Port Authority, seeking all documents relating to the RiverCentre Connection project in late December 2000. (Baillon's Informal Brief to Minnesota Court of Appeals at 11 n.2 & 19). In response to Baillon's Data Practices Act request, the Port Authority produced all documents in its possession regarding the acquisition of the Baillon property. (*Id.*).

Having been advised that Baillon may be challenging the Port Authority's proposed acquisition, on January 24, 2001, the Port Authority filed and served its Memorandum of Law in Support of Its Petition in Condemnation and Motion for Transfer of Title and Possession Under Minn. Stat. § 117.042. On the afternoon before the hearing, Baillon submitted a nine-page, single-spaced letter brief in opposition to the taking and use of the quick take procedure by the Port Authority. (PA 4, 7). The letter brief was accompanied by the Affidavit of James L. Forman, to which were attached eleven exhibits, comprising approximately one inch of paper. (Ct. App. Appendix at 40-240). The district court's hearing lasted over an hour. (Baillon's Informal Brief to Minnesota Court of Appeals at 5). Additional exhibits were introduced during the hearing. (PA 4).

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[5] The "quick-take" procedures require:

> Whenever the petitioner shall require title and possession of all or part of the owner's property prior to the filing of an award by the court appointed commissioners, the petitioner shall, at least 90 days prior to the date on which possession is to be taken, notify the owner of the intent to possess by notice served by certified mail and before taking title and possession shall pay to the owner or deposit with the court an amount equal to petitioner's approved appraisal of value.

Minn. Stat. § 117.042 (2000).

District courts have broad discretion in determining the procedures to be used at the hearing on a condemnation petition. *See In re Condemnation by Minneapolis Cmty. Dev. Agency of Certain Lands* ("*MCDA I*"), 439 N.W.2d 708, 711 (Minn. 1989). The Minnesota Court of Appeals addressed Baillon's due process argument by stating:

> The district court was not required to grant any additional hearing. Baillon did not show, either at the hearing in district court or in any submissions with this court, how allowing witnesses to testify at the hearing would have provided any compelling evidence against the propriety of the taking. Because we find that the district court hearing was sufficient for Baillon to present evidence contesting the necessity of the taking and that the district court was not required to grant Baillon's motion for an additional evidentiary hearing or trial, Baillon's due process rights were not violated.

(PA 7) (citations omitted).

The Minnesota Court of Appeals carefully considered the facts and case law in reaching its conclusion. Baillon had pre-hearing access to all the Port Authority's documents. (Baillon's Informal Brief to Minnesota Court of Appeals at 19). Baillon submitted a brief in opposition which was accompanied by an affidavit with eleven attached exhibits. (Ct. App. Appendix at at 31-38, 40-240). Baillon presented oral argument to the district court. (PA 4). As noted by the Minnesota Court of Appeals, "Baillon's due process rights were not violated." (PA 7).

C. Petitioner Was Not Entitled To A Public Hearing Because The Minnesota Court of Appeals Determined As A Matter Of Fact That The Port Authority Was Not Acting As The City's Agent

The question Baillon argues to the Court (whether the Port Authority should be required to follow the City's procedures where it is acting as the City's agent), while novel, is not before the Court because under Minnesota law, the Port Authority was not the City's agent.

Whether an agency relationship exists is a question of fact, and the party alleging the existence of the agency has the burden of proof. *White v. Boucher*, 322 N.W.2d 560, 566 (Minn. 1982). "Generally, an agency relationship is based upon consent by one person that another shall act on his behalf and be subject to his control." *Frank v. Winter*, 528 N.W.2d 910, 914 (Minn. Ct. App. 1995) (citations omitted). This right of control by the principal over the agent is an element necessary to support a finding that an agency relationship exists. *Teeman v. Jurek*, 312 Minn. 292, 299, 251 N.W.2d 698, 702 (1977) (citing *Jurek v. Thompson*, 308 Minn. 191, 198, 241 N.W.2d 788, 791 (1976) (right of control is "the critical element.")). Baillon makes no reference to this essential element of an agency relationship and never has. In the absence of any persuasive evidence of right of control "there is no agency as a matter of law." *Thompson*, 241 N.W.2d at 793; *see also Vieths v. Ripley*, 295 N.W.2d 659, 664 (Minn. 1980) (agency relationship does not exist unless there are facts showing that the alleged principal had the right to control the agent's conduct in performing the services).

The Port Authority was not subject to the City's control. The Saint Paul Port Authority was created by the Minnesota legislature. *See* Minn. Stat. § 469.049, subd. 1 (2000). "A port authority is a body politic and corporate with the right to sue and be sued in its own name." Minn. Stat. § 469.049, subd. 2 (2000). "A port authority carries out an essential

governmental function of the state when it exercises its power . . . ." *Id.* (emphasis added). The Port Authority is not an agent of the City. The document Baillon primarily relies upon for making its agency argument, the Agreement, expressly rejects the establishment of an agency relationship between any of the parties: "No partnership, joint venture, or principal-agent is established among the parties under this Agreement." (PA 62).

Not only did the parties express their intent not to form an agency relationship, but, as the Minnesota Court of Appeals found, the facts do not support a finding of an agency relationship between the Port Authority and the City. (PA 11). The Port Authority adopted its own Resolution on January 25, 2000, four months prior to signing the Agreement. (PA 41). The terms of the Port Authority's Resolution specifically direct that "in the event negotiations for the acquisition of the property are not fruitful, legal counsel is hereby authorized and directed to acquire said property in the name of the Port Authority pursuant to the Port Authority's power of eminent domain." (PA 42) (emphasis added). As the Minnesota Court of Appeals stated:

> [T]he evidence shows that the port authority had an independent interest in the acquisition of the property and that it controlled both the fact and the method of the acquisition. The property is located in the port authority's economic development district and the port authority, as owner of major downtown hotels, would benefit from a pedestrian link in downtown Saint Paul. If the port authority was unsuccessful in attempting to purchase the property, it was to acquire the property in its own name through its own power of eminent domain and with its own funds. The substantial evidence on this issue in the record compels the conclusion that the port

> authority was not serving as the city's agent in this taking.

(PA 11).

The district court and the Minnesota Court of Appeals addressed the factual issue of whether an agency relationship exists between the Port Authority and the City. Both found that the Port Authority was not an agent of the City; that the Port Authority was acting in its own interest; and the Port Authority would be spending its own money to provide Baillon with just compensation. (PA 11). These findings rested upon the Minnesota courts' interpretations of the Minnesota constitution, Minnesota statutes, Minnesota case law and the City Charter. There is no reason for this Court to disturb those findings.

CONCLUSION

Baillon has waived the federal question it now claims is before this Court. Further, the Minnesota Court of Appeals correctly applied Minnesota law in determining that the Port Authority was not the agent of the City and that Baillon had received the process to which it was due in this condemnation proceeding. Because Baillon raises no issue worthy of certiorari review, its petition should be denied.

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